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IN THE

Supreme Court of the United States

FEBRUARY TERM, 1930.

No. 281.

UNITED STATES OF AMERICA,
Appellant,

vs.

D. D. ADAMS.

BRIEF FOR ADAMS.

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STATEMENT.

The judgment of the District Court of the Eastern District of Arkansas, herein sought to be reversed, grew out of an indictment in said court of D. D. Adams charged with making or causing to be made a false entry touching the depositing on June 30, 1926, of a draft for $75,000 in the Union Bank & Trust Co., of Batesville, Arkansas, a member of the Federal Reserve System.

The indictment alleged that this was a false entry inasmuch as it was contended that Adams had no reasonable expectation that the draft would be honored.

The statute, Section 5209, Revised Statutes, as amended by the Act of September 26, 1918, Chapter 177, makes the making of a false entry with intent to injure, defraud or deceive certain officers and persons therein mentioned, a criminal offense. The intent to defraud, injure or deceive is the essence of the offense. A false entry without such an intent is not a crime, however false the entry may be.

On a trial on such a charge, if the entry be proved or admitted, the sole question to be submitted to a jury is one of intent. If the act were not accompanied by such an intent the defendant is not guilty.

In the case at bar such was the fact. Adams, the president of said bank, deposited on June 30, 1926, in said bank, a draft for $75,000 and took credit therefor. The draft was not honored, and subsequently was charged back to the account of Adams.

For this act Adams was indicted, tried and acquitted in said court.

The sole difference between the indictment on which the defendant was tried and acquitted and the one to which the plea of former jeopardy and former acquittal was sustained is that the indictment on which he went to trial charged that the false entry was made in a book of said bank entitled "Journal, ledger, and daily balance book", and this one, in another book of the same bank entitled 'individual ledger."

The plea of former jeopardy and former acquittal urged against the indictment before the court, alleged that the two indictments grew out of a single act by Adams; that is, the drawing an depositing in said bank

of said draft for $75,000, and contains, among other averments, the following:

"That evidence was introduced by the United States in said former trial whereby it was shown, and the United States relied for a conviction, that the said D. D. Adams did draw a certain draft on said 30th day of June, 1926, signed by the Dixie Cotton Oil Company, by D. D. Adams, on the Interstate Trust & Banking Company, of New Orleans, La., and take credit upon the books of said company for said sum of $75,000, and charge same to the Federal Bank & Trust Company, of Little Rock, all of said charges and credits and said draft being the identical charges, credits, and drafts, and all being based upon the single act of placing said draft in the hands of a cashier or assistant cashier of said Union Bank & Trust Company on said 30th day of June, 1926, upon all of which the Government must now rely for a conviction herein, and said charge being the same identical charge as that contained in the present indictment, and the evidence required to convict in this case being the same identical evidence heretofore introduced and relied upon by the Government, and said indictment being based upon the same identical section of law, to wit, Revised Statutes of the United States, Sec. 5209, Sept. 26, 1918 (40 Stat. 972).

"That before the jury would be authorized to convict the defendant in this case of the crime of making the false entry charged, it would first be necessary for it to hear and consider the same identical evidence submitted to the jury in the former trial and to draw different and opposite conclusions from said evidence to that reached by the jury in the former trial.

"And defendant here tenders proof of all of the al-

legations and facts set forth and alleged herein and prays that upon a hearing of said evidence that the indictment herein be quashed and that defendant be discharged." (Record, pages 3-4)

To this plea the Government interposed a verbal demurrer.

No entry of that appears of record. The judgment of the Court, however, does recite that this plea was submitted to the Court with certain exhibits and on **"argument of counsel in support of said plea, as well as the District Attorney in opposition thereto, and the Court being well and sufficiently advised as to the law arising upon said plea."** (R. 12.) This makes it perfectly apparent that the allegations of fact in the plea were conceded by the Government to be true and **"that before the jury would be authorized to convict the defendant in this case of the crime of making the false entry charged it would first be necessary for it to hear and consider the same identical evidence submitted to the jury in the former trial and to draw different and opposite conclusions from said evidence to that reached by the jury in the former trial."**

The sole question then for determination by this Court is whether the recording of the same item on the same day in two separate books of the same bank with the same intent constitutes, if an offense at all, *one offense or two offenses.*

The Government insists that each time this item was recorded in a separate book of the bank a separate offense was committed. The defense disputes this construction.

ARGUMENT.

This case arises out of Section 5209 R. S. as amended by the Act of September 26, 1918, c. 177, 40 Stat. 967, 972 (U. S. C. Title 12, Sec. 592).

Learned counsel for the Government argues that this statute should be liberally construed and cites cases alleged to support that contention.

In Re McKnight v. United States, 111 Federal Reports, 735, the Court held the contrary and therein said: "The statute so far as it relates to reports and book entries is certainly highly penal, and should be strictly construed."

In further support of its contention the Government cites, In re Snow, 120 U. S. 274.

In that case the court held, and properly so, that the entry of each separate item in any book of a bank, if a false entry with the intent prescribed by the statute, constitutes a separate offense.

As an illustration, when Adams drew that draft for $75,000, and took credit for it, on the same day and the same time had he drawn another draft for $10,000, and taken credit for it, the entries made recording these acts, if they were false entries within the meaning of the statute, would have been two offenses, one for the recording of each of the drafts.

But the Court did not hold that the recording of the one item of the one draft was a separate offense for each book of the bank in which that item was recorded and, therefore, it is not in point.

Likewise, counsel for the Government cites *In re Henry*, 123 U. S. 372, in which the mailing of separate letters was held to constitute separate offenses.

It did not hold, however, that the crime was multiplied by each time one letter was handled by a clerk in

the Post Office, such as placing it in a bag, transmitting it through the mails and removing it from the bag. To support the Government's contention here the Court would have had to have held that such separate handlings constituted separate offenses. But it made no such holding.

Learned counsel for the Government also cites *Ebbling v. Morgan,* 237 U. S. 625.

Here the Court was construing a statute which made it a criminal offense, among other things, to cut or tear a mail bag with the intent to steal its contents. The Court in the case cited held that the cutting into each separate bag to steal its contents was a separate offense.

The correctness of that holding is obvious, because each bag contained separate articles, and the cutting into a bag to steal its articles enclosed therein constitutes the offense.

The Court would have had to have held, to make that case an authority to support the Government's contention here, that each rent or cut in the sack with the prescribed intent constituted a separate offense, so that if one should make a dozen slashes in one mail bag to enable him to steal the contents of that bag he would have committed a dozen offenses. The Court made no such ruling.

Other cases are discussed. Such as *Albrecht v. U. S.,* 273, and *Gavieres vs. United States,* 220 U. S. 338, is also cited as an authority. The cases dealing with that statute and cited by the Government can furnish no guide for the construction of the statute before the Court. There is nothing in common between the two. The statute construed had a dual object in view—to preserve the public peace and to protect an officer of

the United States from insult. Of course, a single act might violate both provisions of that statute. The statute, however, before the Court has but one object in view—the protection of banks. So a construction of the former statute can shed no light upon the true intent of Congress in passing the latter. No time, therefore will be devoted to the analyzing of these cases.

THE PLEA OF FORMER JEOPARDY AND FORMER ACQUITTAL.

> "* * * it seems to us very clear that where * * * a person has been tried and convicted for a crime which has various incidents included in it, he can not be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."
>
> *Re Nielsen*, 131 U. S. 176, 188.

In the case at bar the two incidents are these:

The recording of the same item (that is, the draft for $75,000.00), the same day, in the same bank was posted in two books, one the "journal ledger and daily balance book" and the other the "individual ledger," to record the same item (that is the draft), and necessarily reflect the same intent. The same statute was involved in the two indictments, the same draft, the same bank, the same person and the same act upon the part of Adams, and the same intent.

To the following statement of the law all authorities agree:

If all the elements of either crime are included in the other a plea of former jeopardy will lie. In other words, if on proof of either indictment the defendant might have been found guilty of the other, the plea is good. If the defendant could have been

found guilty under the indictment charging that the entry was made in "the journal ledger and daily balance book" on the proof which would be necessary to sustain the indictment on the same entry in the "individual ledger," the plea is good.

The first indictment alleged that Adams drew a draft with an intent to deceive, cheat or defraud, and deposited it in the Union Bank & Trust Company of Batesville, Arkansas, and that this was entered in a book kept for that purpose and designated "journal ledger and daily balance book." If this act had been proved, Adams would have been found guilty under that indictment.

The indictment at bar alleges the doing of everything that was charged in the first indictment except that the entry was made in a book designated "individual ledger."

It follows that to support the allegations in either indictment, proof of every fact from which the jury would have to deduce its finding of Adams' intent would have to be submitted upon the trial of either indictment. In other words, there was not a single fact or circumstance connected with the entire transaction that is not the same fact or circumstance connected with the recording of this item in either book, except merely the name of the book itself. There is not a single thing that Adams did or caused to be done that is not common to both indictments. Since that is so, all authorities agree the plea will lie.

But our argument does not have to go so far as this. The Nielsen case, 131 U. S. 176, 188 (*supra*) held that a person who has been tried for a crime holding various incidents "cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."

The Neilsen case has never been overruled, and has been cited with approval down to 1925.

Thus, even though it may be conceded that the proof of the indictment charging that the entry was made in the "Journal ledger and daily balance book" would not necessarily include proof that this same entry was made in the "individual ledger," yet every element, except the book in which it is entered, is present in both and would be proved by exactly the same evidence.

In Bishop on Criminal Law, 9th Edition, Section 991, page 774, appears the following:

> "* * * the constitutional provision * * * should be liberally construed,"

as to

> "* * * the parts in his (defendant's) favor."

Further, the same authority, page 775, Section 1051:

> "When, in Reason, Offense Same.—Just principle seems to sustain the following: They are not the same when (1) the two indictments are so diverse as to preclude the same evidence from maintaining both; or when (2) the evidence to the first and that to the second relate to different transactions, whatever be the words of the respective allegations; or when (3) each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction,—a proposition of which the exact limits are difficult to define; or when (4) some technical variance precludes a conviction on the first indictment, but does not appear on the second."

In this case none of these propositions would seem to apply. They are not so diverse as to preclude the

same evidence, nor do they relate to different transactions. The indictments do not set out offenses different in all elements, one from the other, and the question of technical variance does not apply.

The author further says:

> "The offenses are the same whenever evidence adequate to the one indictment will equally sustain the other. Moreover, if the two indictments set out like offenses and relate to one transaction, yet if one contains more of criminal charge than the other, but upon it there could be a conviction for what is embraced in the other, the offenses, though of different names, are, within our constitutional guaranty, the same."

In *Wharton on Criminal Law*, 2nd Edition, (1912), page 507, appears the following:

> "Part of a single crime, prosecution for and conviction or acquittal of, is a bar to any subsequent prosecution based on the whole or any part of the crime charged." (Citing State v. Cross, 101 N. C. 770; State v. Emory, 68 Vt. 109; State v. Emory, 59 Vt. 84.)

In the latter case this appears:

> "The proper test is: Was the matter set out in a second indictment admissible as evidence under the first indictment where a conviction should have been properly maintained upon such evidence? If the answer is yes, then the pleading is sufficient; otherwise, it is not. Acquittal of a charge of crime is a bar to a subsequent prosecution for the same offense under a different name, in all cases where the accused might have been found guilty and sentenced on the offense charged in a later indictment

under the former prosecution. Conviction or acquittal in one offense is a bar to a prosecution in another in all those cases where the later offense charged is a necessary element in and constitutes an essential part of the former."

The same test is applied in ex parte Henkes, 260 Fed. 276, 282:

"It is a general rule if two indictments set out like offenses and relate to one transaction, yet if one contains more of criminal charge than the other, but upon either there would be a conviction for what is embraced in the other, the offenses, though of different names, are within our constitutional guaranty the same. Fox v. State, 50 Ark. 528, 8 S. W. 836; State v. Cooper, 13 N. J. Law, 361, 25 Am. Dec. 490; 1 Chitty, Crim. Law, 455.

Offenses are the same, whenever evidence adequate to the one indictment will equally sustain the other. United States v. Lee, 4 Cranch, C. C. 446, Fed. Cas. No. 15586; United States v. Miner, 11 Blatchf. 511, Fed. Cas. No. 15780; Holt v. State, 38 Ga. 187; State v. James, 63 Mo. 570; Wright v. State, 17 Tex. App. 152; In re Nielsen, 131 U. S. 176; 9 Sup. Ct. 672, 33 L. Ed. 118; United States v. Chouteau, 102 U. S. 603; 26 L. Ed. 246; Coffey v. U. S., 116 U. S. 436."

AN INTENT ON THE PART OF APPELLEE TO INJURE, DEFRAUD OR DECEIVE IS AN ESSENTIAL INGREDIENT COMMON TO THE OFFENSE CHARGED IN BOTH INDICTMENTS AND RESTS UPON THE SAME EVIDENCE. APPELLEE WAS ACQUITTED OF IT IN THE FORMER CASE AND THEREFORE CANNOT BE PLACED ON TRIAL AGAIN.

It will be noted that, under the terms of the statute, it is not enough merely to charge that a false entry was made in a book, record, report or statement of a Federal reserve or member bank. That alone does not constitute a crime. An intent to injure, defraud or deceive a Federal reserve bank, a member bank, the Comptroller of the Currency, an agent or examiner, or certain others enumerated, is an essential element to the crime itself. Without such intent, there is no offense. Indeed, intent is the very essence of the crime. So, in order to allege an offense, it was necessary to charge in the former indictment that in connection with the transaction there involved, the defendant entertained such intent. That averment was made in that indictment. The defendant was tried upon it and the jury found that no such purpose existed and consequently returned a verdict of acquittal. That intent is expressly alleged in his indictment. The same draft is involved. The same transaction is relied upon by the Government, that is to say, one draft, one drawer, one drawee, one amount, the same day and date—one set of facts from which it must be determined whether the transaction was valid or faked. In other words, relating to the identical transaction, it must be determined whether appellee, in connection with that draft,

that drawer, that drawee, that amount and that set of facts, intended to injure, defraud or deceive. The two entries, one relied upon in the former case and the other here, were contemporaneously made and related to the same transaction. Can it be argued that, at the time one of these entries was made appellee had one purpose of mind and a different purpose when the other entry was made? The condition of appellee's mind, that is to say whether he knew the transaction to be faked and consequently intended to injure, defraud or deceive, was the essence of the former charge. It is the essence of this charge. That purpose must be gleaned from and decided upon the same facts. Those facts were adduced upon the former trial, the Government contending that he intended to injure, defraud or deceive; appellee contending otherwise. Those facts must necessarily be adduced and relied upon here, the Government and appellee making the same respective contentions. The very essense is the same and must be concluded from the identical facts.

The same intent, of course, accompanied the entry of this draft in the "journal ledger and daily balance book" and the "individual ledger" since each grew out of the one *act of Adams*. Two prosecutions cannot grow out of the one criminal intent.—Munson v. McClaughry, 198 Fed. 72 (8th Circuit 19123), the following rule seems to have been approved:

> "Whenever in any criminal transaction a felonious intent is essential to render it a crime and without proof of which no conviction can be had, two informations founded upon the same intent cannot be maintained."

It is true that in Stevens v. McClaughry, 207 Fed. 18 (8th Circuit) appears the following:

> "Two or more separate offenses which are committed at the same time and which are parts of a single continuing criminal act, inspired by the same criminal intent which is essential to each offense are susceptible to punishment."

This was known as the "Same Transaction Rule", and was applied chiefly in the Eighth Circuit. That doctrine was refuted in U. S. v. Hampden, 294 Fed. 345, 347, (1923) when the Court said:

> "This doctrine, however, and the decisions in which it was expressed, were expressly rejected by the Supreme Court in Morgan v. Devine, 237 U. S. 632."

Likewise after referring to various other cases the Court said in U. S. v. Hampden in the words of the Nielsen case,

> "It is true that where a person is tried and convicted of a crime which has various incidents included in it, he cannot again be tried and punished for an offense consisting of one or more of such incidents, for this would be double punishment".

Then in conclusion, suppose that due to a difference in the system of bookkeeping, one bank would make seven entries regarding a given draft or other transaction, and another bank would make only one entry regarding the same kind of a transaction, draft or check. Can it be argued, if such transaction, check or draft is not bona fide but faked, the officials of the former bank could be indicted, tride, convicted and sentenced seven times, while the officials of the other bank could suffer only one incarceration, the two transactions being exactly alike? If so, although Congress attempted to

fix the maximum punishment for the offense not to exceed five years imprisonment or a fine of $5000, or both. Yet if the government's contention be correct and each book in which the transaction is recorded constitutes a separate offense it would necessarily follow that each day this transaction was re-recorded, likewise would be an offense and a penalty of life imprisonment might well be incurred by a single act of the defendant. Obviously, Congress had no such thought in mind.

The judgment of the Court sustaining the plea of former jeopardy and former acquittal should be affirmed.

Respectfully submitted,

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